THE OWNERSHIP OF RAILROAD PROPERTY.

THERE might be some doubt whether private corporations really own their own property, if it were necessary to accept certain doctrines recently promulgated. But as constitutional law, in this country, has or ought to have a stable foundation, it is proper to assume that there are some things which are conclusively settled. Among these is the principle that an act of incorporation is a contract between the State which grants it and the corporation which it creates, and that this contract is under the protection of the Federal Constitution. This principle cannot be eliminated from our constitutional law by anything short of an erasure from that constitution of the clause which declares that no State shall pass any law impairing the obligation of contracts. But while it has not yet been proposed to alter the constitution in this respect, there has of late been manifested a strong disposition to devise means of evading its application to the chartered powers of railroad corporations created by the States. Within the past ten years, cases have reached the Supreme Court of the United States in which that tribunal has been called upon to determine what contract between a State and a railroad corporation actually existed. This brought into view certain powers of revision or alteration of charters, which have been expressly reserved in the charter itself, or in the State Constitution under which it was granted, or in previous statutory enactments of a general character, which became, either by express reference or by fair implication, a part of the contract. To rescue the points calling for decision in the so-called "Granger cases," and judicially determined in them, from their apparent connection with a certain doctrine promulgated at the same term in the case of Munn *vs.* Illinois, is what every reader has to do,

who is concerned to know what has and what has not been judicially determined on the subject of legislative control over the rates of freight charges by railroad corporations.

Before making this discrimination, it is important to note the strength with which the principle has been asserted, that a State legislature may, by contract with a private corporation, bind itself not to exercise over the property of that corporation a power which otherwise belongs unquestionably to the State over all private property. It is now conclusively settled that where the State Constitution does not expressly restrain the legislature from so dealing with the taxing power, and there is a stipulation in the charter of a railroad corporation which clearly and unequivocally imports that the State will not tax the corporate property, effect must be given to the contract the same as if it were a contract between private persons, without regard to its supposed injurious effect upon the public interests.* When it is considered that the taxing power is one of the most transcendently important of all the powers of a State, it would seem that if the legislature can make a binding contract with a private corporation in restraint of *that* power, it may, *a fortiori*, make an irrevocable contract that the corporation shall fix its own rates of charges for services which it renders to the public. The latter is a power which it is of far less consequence that the State should hold under its own control than it is that it should hold and exercise the taxing power. But while it has not yet been seriously denied that the State may, by contract, vest in a private corporation an irrevocable power to make its own bargains with individuals for the services which it renders, the manner in which the five railroad cases were disposed of by the Supreme Court, in 1876–7, has led to the assumption that there is a doctrine respecting the use of private property the employment of which affects the public at large, which will in some way act as a source of legislative power, aside from the stipulations or contracts embraced in a charter of incorporation, either by displacing or modifying them. This was a very new doctrine respecting the use of private property, which was much elaborated by Mr. Chief Justice Waite, in delivering the opinion of a majority of the court in the case of Munn *vs.* Illinois. It is important, therefore, to know what that case was.

* Wilmington Railroad *vs.* Reid, 13 Wallace's R. 264. New Jersey *vs.* Yard, 5 Otto's R. 104.

It related to certain private establishments in the city of Chicago, known as grain-elevators, or warehouses for the storage of grain in bulk, belonging to different owners, and deliverable, not specifically, but in quantity, upon receipted certificates. The party whose case came before the Supreme Court had carried on this private business for many years on his own premises, before the year 1870. In that year, an amended constitution of the State declared all such establishments to be public warehouses, and subjected them to regulation by the legislature. In 1871, the legislature passed a law requiring the owners of these establishments to take out licenses as public warehousemen, and fixing their rates of charge for the storage of grain. The constitutional validity of this statute was contested, not upon the ground of contract between the State and the owner of the grain-elevator,—for there was no such element in the case,—but upon the ground that the law was repugnant to the Fourteenth Amendment of the Federal Constitution, because it deprived the owner of his property "without due process of law." Now this, be it observed, was the exercise of an exceptional, direct, special will of the sovereign people of the State, acting through a constitutional provision which clothed a certain private property with a public use, that never could have affected it without such an act of the sovereign will. Whether that sovereign will of the State could or could not so affect private property, notwithstanding the prohibition of the Fourteenth Amendment of the Federal Constitution, it is clear that nothing short of the will of the sovereign could clothe a private property, used in a legitimate private business, with a public use, or a public interest, which would authorize the legislature to regulate the rates of charge for that use. Yet, from the doctrine elaborately set forth in the opinion of the Chief Justice, for the purpose of vindicating the reasonableness and propriety of this exercise of the sovereign power of the State against the objection that it violated the Fourteenth Amendment of the Federal Constitution, it would seem that the case was decided upon the principle that there arises a species of dedication by the owner to a public use, in every case where private property is used in an employment that affects the public at large. If the majority of the court had said that in this particular employment the constitution of the State had, by a special act of the sovereign will, clothed the property with a public use, and that this act of the sovereignty

of the State was not inconsistent with the Fourteenth Amendment, whatever constitutional lawyers might have thought of the decision, or however strong might have been the expectation of a different result from the most exalted tribunal in the land, it would have rested where it ought to rest. But when, aside from the special exercise of the sovereign will of the State, a doctrine of dedication by the owner was resorted to, by which, it is said, all private property becomes clothed with a public interest when its use affects the community generally, it is apparent that a source of legislative power was introduced which does not rest upon a special exercise of the sovereign will in a particular case, but which may be resorted to without being specifically created by the State Constitution and expressly conferred upon the legislature. The following are the terms in which this sweeping doctrine was laid down by the learned Chief Justice:

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."*

The decision of the five railroad cases, commonly called "the Granger cases," followed immediately after the decision in Munn *vs.* Illinois. In the first of them, the Chief Justice, speaking for the same majority, said, in a prefatory passage of his opinion:

"Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are therefore engaged in a public employment affecting the public interest, and, under the decision in Munn *vs.* Illinois, subject to legislative control as to their rates of fare and freight, unless protected by their charters."†

In the other cases, the doctrine of the owner's presumed dedication to public use appears to have been regarded as the source of the legislative power, notwithstanding the fact that

* Munn *vs.* Illinois, 4 Otto's R. 113, 126.

† Chicago, Burlington, and Quincy Railroad Company *vs.* Iowa, 4 Otto's R. 155, 161.

the question in each case related to the scope of the reserved power to alter or amend a charter.* These were all decisions by a majority of the judges; two of the members of the court, Mr. Justice Field and Mr. Justice Strong, dissenting throughout, as well in the grain-elevator case as in the railroad cases.

The meaning of these rulings is apparently this: That in a case where the charter of a railroad corporation does not expressly contain a contract that the corporation shall alone regulate its own charges, the doctrine of implied dedication of the property to public use, by reason of the nature of the employment, comes in as the source of a legislative power to regulate the charges for the use of the property, without any constitutional creation and delegation of such a power. But here it may be remarked that if such a dedication by the owner is to be presumed, it must enter into and qualify any grant which the charter contains of a power in the corporation to fix its own charges. But aside from this consequence, it will appear to any one who closely examines the point with which the court were confronted in the railroad cases, that the decision called for, and the only decision that can, in a judicial sense, be predicated of them, was whether there was or was not, in each case, a contract between the State and a corporation of its own creation, under which contract the corporation was or was not subject to legislative interference with its rates of charge. If an express and irrevocable contract existed, it determined the case in favor of the corporation. If no such express contract existed, the legislature, if it could interfere at all, could do so, not by reason of any dedication of the property to public use by the owner, but by reason of such power over the corporation as the legislature had reserved when it granted the charter. If there was no reserved power, or if the reserved power did not rightfully comprehend a right to regulate the charges for the use of the property, the contract between the State and the corporation, which vested in the latter the power to fix its own rates, was complete and irrevocable. These were the questions, and the only ones, that could be judicially decided in the five railroad cases. There was not one of them in which the State Constitution had expressly clothed the private property of railroad corporations

* Peik *vs.* Chicago, etc., Railway Company, 4 Otto's R. 164, 176, 178. Winona and St. Peter Railroad Company *vs.* Blake, Ibid. 180.

with a public use; and the doctrine that all private property is clothed with a public use by the owner's presumed dedication, where that use affects the public generally, could not judicially influence the decision, unless it was intended to be understood that this doctrine displaces or modifies the contract between the State and the corporation. As a substantive source of legislative authority, this doctrine could not judicially affect the decision of the railroad cases for two reasons: first, because it had no constitutional basis, such as existed in the grain-elevator case, and secondly, because the court, in the railroad cases, were called upon to determine the true scope and limitation of the reserved power to alter or amend a charter. This was not done; and consequently it remains for final judicial determination, whether the general reservation of a power to alter or amend the charter of a corporation comprehends a power to fix the rates that may be charged for the use of the property of such corporation.

The kind of corporation, or the kind of property which it holds and uses, or the degree, more or less, with which that use affects the community generally, can never determine the scope of the general power of amending or altering charters which the State has reserved, either by its constitution or its laws. The idea that the owner of private property grants to the public a right to dictate the terms on which it may be used, because he devotes it to an employment that affects the public more or less, would subject all private property in any branch of business to such an interference; for there is no use of private property in any business that does not in some way affect the public generally. Such a power over private property as was exercised by the people of Illinois in respect of the grain-elevators—monstrous and tyrannical I cannot help considering it—could be exercised by none of our State legislatures without an express constitutional provision. None of them hold any common law powers over private property, and they hold no other powers over it excepting those which are conferred by the constitutions from which they derive all their powers. They hold and exercise the taxing power, the power of eminent domain, and the police power; and by each of these private property and its uses may be affected. But unless a State Constitution expressly creates and confers on the legislature a power to impress a public use upon private property, such a power can find no foundation in the doctrine that the owner has presumably dedicated it to

public use, because he employs it in a business that affects the public.

When we turn from the private property of individuals to the property of private corporations organized for business purposes, we must not overlook the fact that all such corporations are the creations of a contract between the State and the incorporators. All the powers, privileges, rights, and franchises which the corporation holds, are brought into being by a grant made by the State, and that grant is a contract. It is not so with the corporate property. That is private. The power and authority which the State holds over the corporation is that for which it has contracted. It may be a power to repeal the grant of incorporation, wholly or partially; or to modify the charter; or to make rules and regulations for the conduct of the business; or to forfeit the franchise altogether, for sufficient cause. All this depends upon what the State has reserved a power to do, by express stipulation in the charter, or in the laws which enter into and make a part of the contract. Of all this, too, the incorporators have had notice; and they have accepted the grant with a full understanding of its terms. But it may be safely asserted that no body of men in this country ever asked for or accepted an act of incorporation for business purposes, and invested their money in the enterprise, with an implied understanding that they dedicated the corporate property to a public use, or clothed it with a public interest, by using it in a business which affects the community at large. What they did agree to was this: That their property should be subject to such legislative control as the contract embraces; to the exercise of the taxing power, if not specially restrained by the charter; and to the exercise of the police power of the State, and the power of eminent domain. Beyond these sources of power, namely, the contract, the police power, the right of eminent domain, and the taxing power, I know of no legislative authority over the property of private corporations. That the corporation has been chartered because the public convenience would be promoted by its existence, and has been authorized to acquire land by an exercise of the right of eminent domain, paying therefor a just compensation, can authorize no legislative control over the price that may be charged for the use of its property, unless that control has been in some way reserved to the State by the contract. The public benefit that is to be derived from the incorporation and invest-

ment of private capital in a railroad, is the consideration on which all the corporate privileges are granted; and that consideration, passing to and accepted by the public as a full compensation for the grant, has spent all its force as soon as the grant has been executed. It cannot be made the foundation of a subsequent legislative control over the property that is to affect its management, its value to the owner, or the owner's dominion over it.

It now remains for me to state, as briefly as I can within the limits of this article, what I conceive to be the true relation between a railroad corporation and the State which has chartered it, and the true limitation of the general reserved power to alter or amend a charter of incorporation, whether such reservation is made in the charter itself, in the constitution under which it was granted, or in standing laws which may be said to form a part of the contract.

In the first place, in what sense is a railroad, chartered by a State and built from private funds, a public highway? In this sense and no other:—that it has been authorized by the State to be constructed, that it has been intrusted with the power of eminent domain in order to enable it to be located and constructed, and that, when constructed, the public at large have the right to avail themselves of its means of transportation of their persons or property, on compliance with the conditions prescribed by the proper authority. The proper authority to prescribe those conditions, when they are only pecuniary, is the owner of the property, the private corporation by whose private means the road has been built; for the ownership of the property of private corporations is as absolute as the ownership of a private individual in the property belonging to him. Furthermore, it must be remembered that a railroad is not like a turnpike, or a public highway, on which tolls are exacted for the privilege of passing over the way; but it is a private corporation, which renders the service of transporting persons or property, and of receiving and delivering persons or property, at its own expense and risk. In other words, the railroad is a common carrier of persons and goods, by means of its own property, at its own expense and risk. So far, therefore, as there is an element of publicity in the character of the corporation and its business, it is in all respects the same as in the case of other common carriers. All common carriers must transact business for all applicants, at reasonable

times, and for a reasonable compensation. A railroad corporation, which carries on the business of a common carrier, at its own expense and risk, and for its own profit, is in the same situation as any other common carrier; and whether the carrier transacts his business over a road which he owns, or over one which the public has built and dedicated to common use, or on the waters of a navigable river, his duties, liabilities, and rights are the same.

This being the sense in which the business is public, and in which the railroad is a public highway,—a sense which does not at all diminish the private ownership, or the control which all private owners may exercise over their own property, unless such control has been in some way expressly curtailed,—the question arises whether a legislative act to regulate the rates of fare and freight, after the grant of a charter authorizing the company to determine its own rates, falls within the reserved power to alter or amend a charter of incorporation, which is found in general terms in many of our State constitutions? Is this an unlimited power? It has been considered heretofore, by very high authorities, that the nature of the act by which a legislature undertakes to alter or amend a charter of incorporation, imposes, or may impose, some restraint upon this general power. It is certain that charters are to be amended or altered by an exercise of what is properly to be regarded as legislative power. Is it, then, an act of legislative power to prescribe for the future what prices may be demanded for commodities or personal services? Is it within the power of any legislature in this country to compel owners of property, whether they are natural or artificial persons, to part with their property, or render their personal services, at their own expense and risk, to the public for prices fixed by the legislature? To me it seems to be very plain that this is not the exercise of legislative power; that it is a mere arbitrary decree, not authorized by a general reservation of power to alter or amend charters, and incapable of being legitimately exercised, unless the State has expressly required the grantees of a charter to accept it on the condition that the legislature may determine the rates which the corporation is to charge for its services. Doubtless such a power can be brought within the field of legislation by the express terms of a charter, because such is the contract. But where there is nothing but a general reservation of a power to alter

or amend a charter, I do not see how such an exercise of power can be said to be within the reservation.*

I have seen it suggested that, under the power to alter, amend, or repeal a charter, it is perhaps possible for a legislature to change, in some cases, or, in other cases, to destroy, contracts between the State itself and the corporation, entered into in the charter. But, without conceding this, it is to be remembered that these are not the only contracts authorized by an act of incorporation. Every railroad corporation must enter into contracts with creditors, who will lend their money to construct and equip the road, and who will take a mortgage security therefor. Such contracts have been made, under the authority of their charters, by nearly every railroad corporation in this country. It has heretofore been held, many times, by the Supreme Court of the United States, that any law of a State which seriously diminishes the property, or the security, or the remedy, that was relied upon by the creditors of a corporation, when they lent their money, or gave their credit, impairs the obligation of their contracts.

Is it, then, a sufficient answer to this to say that such creditors were bound, when they lent their money and took their mortgage security, to know one or both of two things:—either that the State held a reserved power to alter or amend charters, or that it held a general legislative power to treat all private property, the employment of which affects the public generally, as subject to regulation of the price that may be demanded for its use? If it is said that it is the general power of altering or amending a charter of which the creditors were bound to take notice, it is unquestionably true that they must be presumed to have known of its existence; but it remains, nevertheless, a most serious question what this power includes. The creditors certainly were not bound to know, and could not reasonably anticipate, when they lent their money and took their mortgage security, that this reserved power of the State included a power to diminish, at the pleasure of the legislature, the fund out of

* In the two last preceding paragraphs, I have availed myself of the reasoning which I find in a manuscript opinion of the late Hon. Benjamin R. Curtis, of which I possess a copy. It was given in the year 1874, upon the clause in the constitution of Wisconsin which reserved to the legislature a power to alter or repeal all general and special laws. After examining the authorities cited by him, I can see no answer to his positions.

which their interest, and ultimately their principal, were to be paid. No rational person can suppose that money was ever lent to a railroad corporation upon the understanding that the State had reserved such an unlimited and discretionary power over that fund. And, in regard to the doctrine that the creditors knew, or were bound to know, when they lent their money, that all private property in the United States, the employment of which affects the community generally, is subject to a discretionary power of legislative interference with the rates that may be charged for its use, who, before the year 1877, ever heard in this country that the owner of private property grants to the public an interest in its use because it is desirable, or convenient, or beneficial for the public generally to avail themselves of the right to use it, at the expense and risk of the owner? Again, I ask, which of these two sources of power—the reserved authority to alter or amend a charter, or the owner's presumed dedication of his property to public use—is the governmental power that existed before the creditors of our railroad corporations took the contracts authorized by the charters, and is therefore to be regarded as an implied part of those contracts? It is scarcely necessary to point out that either of these sources of power, if it existed at all before the contracts of creditors, is limited by nothing but legislative discretion; and that it is a power to deprive the creditors of all beneficial interest in the income upon which they relied when they loaned their money. No doubt they trusted a good deal to legislative discretion, but I am unable to see that they trusted this.

The limits of this article do not admit of further discussion of this great subject. My present purpose has been simply to show that its further judicial consideration is imperatively called for; and that the present state of the adjudications does not preclude a reëxamination of some of the doctrines that appear to have received the sanction of a majority of the highest tribunal, but from which it is impossible to extract, in a judicial sense, all that has been claimed by the advocates for legislative interference with the contracts of railroad corporations.

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